

No. PD-0527-18

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
10/29/2018
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JAMES ALLAN BURG, II

V.

THE STATE OF TEXAS

**ON DISCRETIONARY REVIEW
FROM THE NINTH COURT OF APPEALS
BEAUMONT, TEXAS
No. 09-16-00200-CR**

**ON APPEAL FROM THE COUNTY COURT AT LAW No. 1
MONTGOMERY COUNTY, TEXAS
CAUSE No. 15-307592**

APPELLANT'S BRIEF ON THE MERITS

**MATTHEW J. DELUCA
STATE BAR No. 24069601
712 MAIN ST., SUITE 2450
HOUSTON, TEXAS 77002
TEL: (713) 429-4400
FAX: (713) 228-2366
MATT@MATTDELUCALAW.COM
COUNSEL FOR APPELLANT**

IDENTIFICATION OF PARTIES AND COUNSEL

Appellant

James Allan Burg, II

Appellant's Trial Counsel

Joseph LaBella
333 Simonton St., Suite 200
Conroe, Texas 77301

Appellant's Appellate Counsel

Matthew DeLuca
712 Main St., Suite 2450
Houston, Texas 77002

Appellee

The State of Texas

Appellee's Trial Counsel

Neel Kapur
Sara Corradi
Montgomery County District Attorney's Office
207 W. Phillips St., 2nd Floor
Conroe, Texas 77304

Appellee's Appellate Counsel

Bill Delmore
Montgomery County District Attorney's Office
207 W. Phillips St., 2nd Floor
Conroe, Texas 77304

Trial Judge

The Honorable Dennis Watson
County Court at Law No. 1
Montgomery County, Texas

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TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

JAMES ALLAN BURG, II, Appellant, in accordance with Texas Rule of Appellate Procedure 70, files this brief on the merits.

STATEMENT OF THE CASE

This is an appeal from a driving while intoxicated (“DWI”) conviction. On May 26, 2016, a jury found Burg guilty of misdemeanor DWI. (6 RR 160-61, CR 99). *See* TEX. PENAL CODE § 49.04(a). The jury assessed punishment at one year in the Montgomery County Jail and a \$1500 fine, recommending that the trial court suspend the imposition of the sentence and place Burg on community supervision. (7 RR 20-21, CR 99). *See* TEX. CODE CRIM. PROC. art. 42A.055(a). The trial court followed the jury’s recommendation and placed Burg on community supervision for a period of 18 months. The trial court also ordered Burg’s driver’s license suspended for a period of one year. (7 RR 22-25, CR 99).

Burg argued on appeal that the trial court was not authorized by law to suspend his driver’s license. The Ninth Court of Appeals affirmed the trial court’s judgment in a memorandum opinion. *Burg v. State*, No. 09-16-0020-CR, 2018 WL1747393, 2018 Tex. App. LEXIS 2531 (Tex. App.—Beaumont, April 11, 2018) (mem. op., not designated for publication). On April 30, 2018,

Burg's motion for rehearing was denied. On September 12, 2018, this Court granted Burg's petition for discretionary review.

ISSUE FOR REVIEW

Does a failure to object to a driver's license suspension at trial bar complaint on appeal?

STATEMENT OF FACTS

Burg was 25 years old when he was arrested for misdemeanor DWI. (8 RR, State's Ex. 1, 3a, 3b, 4, 6). Before trial began, he filed a written sworn motion for community supervision stating that he had not previously been convicted of a felony in Texas or any other state. (CR 72-73). During the punishment phase of trial, Burg testified that he had never previously been arrested or convicted of a crime. (7 RR 8). The jury assessed punishment at one year in the Montgomery County Jail, but recommended that the trial court suspend the imposition of the sentence and place Burg on community supervision. (7 RR 20-21). The trial court placed Burg on community supervision for a period of 18 months and ordered his driver's license suspended for a period of one year. (7 RR 22-24, CR 99). Burg was also ordered to comply with several conditions of community supervision, including the completion of a "DWI 1st Education Program" and the installation of an ignition interlock in his vehicle. (CR 101-03). The record

reflects that Burg's trial counsel did not object to the imposition of the driver's license suspension at trial.

SUMMARY OF THE ARGUMENT

When a person suffers a license suspension as part of a DWI conviction, he has an absolute and nonwaivable right to be sentenced according to the applicable statute. Here, the trial court unlawfully imposed a driver's license suspension as part of Burg's DWI conviction. The lower court mischaracterized the suspension as a condition of community supervision, and erroneously held that Burg waived his right to complain on appeal because he failed to object at trial. But the license suspension was part of his sentence, not a condition of his community supervision. And because he was a first-time DWI offender ordered to complete a DWI education course and install an ignition interlock in his vehicle, the imposition of a license suspension was not authorized by law. Burg could raise his complaint for the first time on appeal, and the lower court erred in its failure to consider the merits of the complaint.

ARGUMENT

A defendant has an absolute and nonwaivable right to be sentenced within the statutorily applicable range of punishment established by the Legislature, the complaint of which can be raised at any time. *Gutierrez v.*

State, 380 S.W.3d 167, 175 (Tex. Crim. App. 2012) (citing *Speth v. State*, 6 S.W.3d 530, 532-33 & n.5 (Tex. Crim. App. 1999) (defendant has a right to be sentenced within the defined “universe of punishments applicable to the offense”))).

On appeal, Burg argued that the trial court’s imposition of a driver’s license suspension violated the law. Citing *Speth*, the Ninth Court of Appeals overruled the issue without considering its merits, and held that Burg could not complain for the first time on appeal because he did not object at trial. *Burg*, slip op. at 19. The lower court came to this succinct conclusion by mischaracterizing the license suspension as a condition of community supervision. *Id.* at 18. But Burg contends that the license suspension here was part of his sentence, not a condition of his community supervision, and the complaint could be raised at any time. The lower court erred by failing to consider his argument on the merits.

I. The license suspension was imposed as part of the sentence.

The “sentence” is the part of the judgment that orders that the punishment be carried into execution in the manner prescribed by law. TEX. CODE CRIM. PROC. art. 42.02. A license suspension is a civil penalty that may be included in a sentence. TEX. PENAL CODE § 12.01(c); *See Ex parte Ward*,

925 S.W.2d 286, 289 (Tex. App.—Corpus Christi 1996, no pet.) (license suspension statute imposes a civil penalty).

II. Community supervision is not part of a sentence.

Community supervision is an arrangement *in lieu of* the sentence, *not as part of* the sentence. *Speth*, 6 S.W.3d at 532 (emphasis in original). In *Speth*, this Court made clear that community supervision was not part of a sentence:

The sentence and the conditions of community supervision are each separate parts of the “judgment.” The [Texas Code of Criminal Procedure] lists twenty-six items the judgment should reflect, including “the length of community supervision, and the conditions of community supervision” and “the term of the sentence” ... That community supervision is not viewed as part of the sentence is further evidenced by the fact that these terms are listed as separate items in the “judgment.” So, while community supervision is part of the judgment, it is not part of the “sentence[.]”

Id.

III. The license suspension was not a condition of community supervision.

The trial court imposed a driver’s license suspension as part of Burg’s sentence. Community supervision is not part of a sentence. Accordingly, the license suspension was not a condition of community supervision. The record contains additional evidence that Burg’s license suspension was not a condition of community supervision. After trial, Burg signed a three-page document titled “Conditions of Community Supervision.” The document

listed several conditions Burg was ordered to comply with while on community supervision. (CR 101-03). The driver's license suspension was not listed in the conditions of community supervision. Instead, the license suspension was listed on the first page of the judgment with other orders of the sentence, including confinement and fine. (CR 99). And, as detailed below, the trial court would have been required to impose a license suspension if Burg *did not* receive community supervision. *See* TEX. TRANSP. CODE § 521.344(a). The trial court's imposition of a license suspension was not a condition of community supervision.

IV. The trial court was not authorized by law to suspend Burg's driver's license.

Generally, a person convicted of DWI is subject to a driver's license suspension. *See* TEX. TRANSP. CODE §§ 521.341(3), 521.344(a). But an exception exists when a first-time offender is placed on community supervision and ordered to complete a DWI education program. *See* TEX. TRANSP. CODE § 521.344(d). Another exception exists when a first-time offender is placed on community supervision and is required to install an ignition interlock device in his vehicle. *See* TEX. TRANSP. CODE § 521.344(d)(2).

In *Love v. State*, 702 S.W.2d 319 (Tex. App.—Austin 1986, no pet.), an appellant was convicted of first-offense DWI and placed on community supervision. On appeal, the appellant complained that the trial court had no authority to impose a license suspension. *Id.* The Austin Court of Appeals agreed, holding the statute, read as a whole, supported the conclusion that a trial court could not suspend the license of a first-time DWI offender placed on community supervision and ordered to complete a DWI education program.¹ *Id.* at 320. In *Miffleton v. State*, 728 S.W.2d 880, 887 (Tex. App.—Austin 1987), *aff'd*, 777 S.W.2d 76 (Tex. Crim. App. 1989), the court drew the same conclusion about the license treatment of first-time DWI offenders, but the appellant in that case was disqualified because he had a previous DWI conviction.

The facts here are similar to those in *Love*. Here, Burg was convicted of first-offense DWI and placed on community supervision. As a condition of community supervision, he was ordered to complete a DWI educational program. (CR 102). A first-time DWI offender placed on community supervision and required to complete a DWI education program does not suffer a license suspension described in section 521.344(a) so long as the

¹ When *Love* was decided, the statutory language that detailed license treatment for first-time DWI offenders was found in former TEX. REV. CIV. STAT. ANN. art. 6687b, § 24(g). Today, the relevant statutory language is found in TEX. TRANSP. CODE § 521.344.

person is at least 21 years old and completes the DWI education program within the allotted time. *See* TEX. TRANSP. CODE § 521.344(d).

Burg was also ordered, as a condition of community supervision, to install an ignition interlock device in his vehicle, and was prohibited from operating any vehicle not equipped with the device. (CR 102). A first-time DWI offender placed on community supervision and required to install an ignition interlock device in his vehicle does not suffer a license suspension described in section 521.344(a). *See* TEX. TRANSP. CODE § 521.344(d)(2). Here, the trial court's imposition of a license suspension was inconsistent with sections 521.344(d) and 521.344(d)(2) of the Texas Transportation Code, and was not authorized by any other statute.

V. Burg can complain of the unlawful license suspension for the first time on appeal.

The trial court went outside the statutorily applicable universe of punishments when it imposed a license suspension on top of Burg's probated DWI sentence.² *See Speth*, 6 S.W.3d at 533 n.5. And although he failed to object to the unlawful suspension at trial, his right to a lawful sentence was absolute and nonwaivable, and he could raise the issue for the first time on

² This Court has cautioned that *Speth* should not be read so categorically as to hold that a defendant may not complain for the first time on appeal of a condition of probation which violates an absolute prohibition. *Gutierrez*, 380 S.W.3d at 175.

appeal. The lower court erred in its failure to consider the merits of Burg's complaint on appeal.

PRAYER

Burg asks this Court to find that he did not waive his right to complain about the license suspension on appeal, to reverse the court of appeals' opinion, and to remand the case so that the court of appeals can address the complaint.

Respectfully submitted,

/s/ Matthew J. DeLuca
Matthew J. DeLuca
State Bar No. 24069601
712 Main St., Suite 2450
Houston, Texas 77002
Tel: (713) 429-4400
Fax: (713) 228-2366
matt@mattdelucalaw.com
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,941 words, in compliance with Texas Rule of Appellate Procedure 9.4.

/s/ Matthew J. DeLuca
Matthew J. DeLuca

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the following parties through efile.txcourts.gov on October 29, 2018:

Bill Delmore
Assistant District Attorney
Montgomery County District Attorney's Office
207 W. Phillips St., 2nd Floor, Conroe, Texas 77304
bill.delmore@mctx.org

Stacey Soule
State Prosecuting Attorney
PO Box 13046, Austin, Texas 78711-3046
information@spa.texas.gov

/s/ Matthew J. DeLuca
Matthew J. DeLuca